

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

February 10, 2009 Session

THOMAS PLEAS ARWOOD, JR. v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Bedford County
No. 11346 Lee Russell, Judge**

No. M2008-01660-CCA-R3-PC - Filed August 17, 2009

Petitioner, Thomas Pleas Arwood, Jr., appeals the post-conviction court's dismissal of his petition for post-conviction relief. Petitioner was convicted by a Bedford County jury in December of 2002, of two counts of theft, two counts of burglary, and one count of evading arrest. Petitioner was also convicted in February of 2003, in a separate trial, of one count of theft. Petitioner was sentenced to an effective sentence of thirty-six years. On direct appeal, this Court affirmed the sentences and convictions. *State v. Tommy Pleas Arwood, Jr.*, No. M2003-01125-CCA-R3-CD, 2007 WL 1890100, at *1 (Tenn. Crim. App., at Nashville, June 28, 2007). Petitioner subsequently filed a petition for post-conviction relief, in which he argued various grounds for relief. After a lengthy hearing, the post-conviction court denied Petitioner's request for relief. He appeals, arguing that the post-conviction court improperly dismissed the petition. After a review of the record, we determine that Petitioner has failed to show that he received ineffective assistance of counsel at trial or on appeal. Accordingly, the judgment of the post-conviction court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Trisha Henegar, Shelbyville, Tennessee, for the Appellant, Thomas Pleas Arwood, Jr..

Robert E. Cooper, Jr., Attorney General and Reporter; Frank Borger Gilligan, Assistant Attorney General; Charles Crawford, District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In January of 2002, Petitioner was arrested and charged with theft of property after an incident at Wal-Mart in Shelbyville, Tennessee. Petitioner was released on bond for this charge. While on bond, Petitioner was arrested and charged with burglary, theft, and evading arrest for an

incident that took place at Johnson Bolt & Screw, a hardware store also located in Shelbyville. Eventually, Petitioner was indicted with three counts of theft of property, two counts of burglary, and one count of felony evading arrest. Prior to trial, Petitioner received a forensic evaluation in order to determine his competency to stand trial and his mental condition at the time of the event. Petitioner was deemed fully competent to stand trial, but there was no separate evaluation conducted to determine Petitioner's mental competency at the time the crimes were committed. In two separate trials, Petitioner was found guilty on all counts and sentenced to an effective sentence of thirty-six years. *State v. Tommy Pleas Arwood, Jr.*, No. M2003-01125-CCA-R3-CD, 2007 WL 1890100, at *1-2 (Tenn. Crim. App., at Nashville, June 28, 2007).

On direct appeal, this Court summarized the facts leading up to Petitioner's convictions as follows:

The following evidence was presented according to the available transcripts and the statement of evidence filed on January 23, 2007: Chief Deputy Dale Elliott testified that he was working at the Bedford County Sheriff's Department the night of February 22, 2002. He left the office around 11:00 p.m., and his drive home took him past Johnson Bolt & Screw. As he passed the store, a blue Oldsmobile without its lights on pulled out in front of him, nearly colliding with the marked police car he was driving. Chief Deputy Elliott testified he followed the car and observed it cross over the center line all the way to the line on the far side of the road. He then attempted to stop the vehicle by activating the blue lights and siren. The driver of the car refused to stop, and Chief Deputy Elliott followed the car until it pulled into the driveway of a house and stopped. Chief Deputy Elliott stepped out of his patrol car when the driver of the Oldsmobile put the car back into gear and drove off around the house through the yard. The car returned to the street where Chief Deputy Elliott again began to pursue the car. Another officer joined the pursuit, and they were ultimately able to force the car to stop.

When Chief Deputy Elliott approached the passenger side of the car, he recognized the passenger as Danny Joe Freeman. He also recognized the driver as the Defendant. Chief Deputy Elliott further testified that he observed six new drills, still in the original packaging, sitting in the back seat of the car. The drills were connected together with a logging chain. Another officer went to Johnson Bolt & Screw to check for a break-in, and when it was discovered there had been a break-in, the Defendant and Freeman were arrested.

Chief Deputy Elliott testified that he was able to easily observe the tools in the back seat because there was nothing covering them up. The drills were in boxes, connected by a heavy chain, on the end of which was a master lock. There was also a Milwaukee saw. After the arrests, Chief Deputy Elliott went to Johnson Bolt & Screw where he observed that the glass panel in the front door was broken. Once he returned to the station, Chief Deputy Elliott discussed the break-in with Mr. Johnson,

the owner of Johnson Bolt & Screw, and Johnson identified the tools found in the car the Defendant was driving. Mr. Johnson also gave a description of a number of other missing tools.

Chief Deputy Elliott testified that he then became interested in Shelly Rogers, who was brought in for questioning. She provided some information that led to a search warrant being obtained for Owen Prince's house. The other items that Mr. Johnson claimed were missing were found at Prince's house after a search. Mr. Johnson then identified the two saws seized from Prince's house.

On cross-examination, Chief Deputy Elliott testified that the car pulled out of the Johnson Bolt & Screw at a fairly slow rate of speed, but during the pursuit the cars approached fifty-five miles per hour. After the car was impounded it was searched, but nothing was found that may have been used to break the glass on the door of Johnson Bolt & Screw. Chief Deputy Elliott admitted that Rogers was very upset when she spoke with the police, she was concerned about going to jail, and she was concerned about Freeman. Rogers' [sic] information was the sole basis for the search warrant.

Lieutenant Trey Clanton testified that he was working the night of February 22, 2002, when he heard over the radio that Chief Deputy Elliott was attempting to stop a possible drunk driver. He fell in behind the Chief Deputy with his blue lights activated. Lieutenant Clanton then passed Chief Deputy Elliott, and they were able to force the car, which the Defendant was driving, to stop. The Defendant stated that he had been drinking and "shooting Dilaudids." He appeared to be intoxicated. Lieutenant Clanton then observed the same tools about which Chief Deputy Elliott had testified. All of the drills found in the car had cardboard sleeves around the cases except one. A sleeve purported to be the missing sleeve was found at Johnson Bolt & Screw.

Shelly Mary Rogers testified that she was Freeman's live-in girlfriend. The Defendant came to Freeman's house on February 22, 2002, and the three left in his "dark blue car." They drove around, drinking, until the Defendant dropped off Rogers and Freeman at Freeman's house. Freeman's brother arrived, and Freeman and his brother began arguing. The Defendant then took Freeman and Rogers to Rogers' [sic] sister's house. On the way, the Defendant stopped the car at Johnson Bolt & Screw. Rogers turned her head away when the Defendant stepped out of the car because she believed he was using the restroom, but, as her head was turned, she hear[d] the sound of breaking glass. By the time she turned around, there were two saws in the car. She did not see anyone enter or exit Johnson Bolt & Screw, and she did not see the Defendant put the saws in the car, but she assumed it was him because there was no one else in the parking lot. The Defendant then got into the car and pulled off.

As the group sped away from Johnson Bolt & Screw, Rogers testified that they discussed to whom the saws could be sold. Rogers came up with the name of Owen Prince. They drove there, Rogers and Freeman went inside with the saws, and they sold them for \$250 or \$300. The Defendant and Freeman split the money. They drove back by Johnson Bolt & Screw and realized that no police had responded to the scene, so they discussed making a return trip. The Defendant took Rogers to his sister's house, and he and Freeman left in the same blue car. After about ten minutes, Rogers saw the car pass by with police following. Once the Defendant and Freeman were arrested, Rogers was also brought to the police station, and she told the police about the saws at Owen Prince's house.

On cross-examination, Rogers testified that she and Freeman had been dating for over a year at the time of the break-in. The three had been riding around drinking since the early part of the morning on February 22, 2002, and she was first dropped off at her house at around 2:00 p.m. The Defendant came back over to her house around 6:00 p.m., and the three left around 7:00 p.m. after Freeman and his brother got into an argument. They again drove around drinking, and they eventually stopped at Johnson Bolt & Screw at about 10:00 p.m. When they arrived, Freeman appeared to be "passed out" with his head up against the window. Rogers reiterated that she did not see the Defendant actually break the door glass or take the saws because as soon as she turned around, the saws were already in the car. However, Rogers admitted she was extremely intoxicated. Rogers testified that, as the car drove off, Freeman woke up, and they proceeded to Prince's house. They stayed there for about fifteen minutes, stopped somewhere on the way home for fifteen minutes, and eventually got back to the Defendant's sister's house at about 11:30 p.m. Rogers admitted she had been convicted of passing a worthless check and charged with crimes associated with this case. However, she denied she had struck a deal with the State.

Alan K. Johnson, the owner of Johnson Bolt & Screw, testified that his business was open on February 22, 2002, from 7:00 a.m. to 5:00 p.m. He went home for the evening, but was later alerted by the Shelbyville Police Department that his store had been burglarized. Once he arrived at the store, he immediately noticed that two gas powered saws were missing, along with a number of cordless drills. He later identified the cordless drills at the police department. Each of the drills was priced at \$209, for a total retail value of \$1254. The Milwaukee saw that was taken had a retail value of \$1400. Johnson identified the gas powered yellow and black saws the next day, and they were valued at \$1099 apiece. Johnson stated he did not give anyone permission to break his door or take his things. On cross-examination, Johnson testified that he paid \$162 dollars each for the drills, \$525 dollars each for the gas-powered saws. One gas powered saw and two of the drills have since been sold.

The Defendant testified that, at around 8:30 on the night of February 22, 2002, he received a call from Freeman who asked the Defendant to pick him up. The Defendant drove over, and Freeman and Rogers got into his car with two yellow saws. The Defendant admitted he knew the saws were stolen when he picked up Freeman and Rogers. Freeman asked the Defendant to take them over to Prince's house, in exchange for a Dilaudid pill. Once they arrived at Prince's house, Freeman and Rogers went inside, and after fifteen minutes they returned to the car with money. They then proceeded to a friend's house, after which they went to the Defendant's sister's house. Freeman and the Defendant then left and "went back to Johnson Bolt & Screw." When they arrived, Freeman jumped out of the car, grabbed a few things, and threw them in the back.

On cross-examination, the Defendant denied a slip of the tongue when he said they "went back to Johnson Bolt & Screw." He denied he had been there before that night. He stated he did take Freeman to Johnson Bolt & Screw, but he denied ever entering the store. The Defendant admitted Chief Deputy Elliott was telling the truth in describing the pursuit. He also admitted opening the trunk for Freeman to put the stolen saws in, so they could be taken to Prince's house.

. . . .

The second trial, concerning Count 1 of the original indictment, occurred on February 18, 2003. Charles Nunley, an employee of Wal-Mart, testified that his job was to look for potential shoplifters. He was working in the Shelbyville Wal-Mart on January 15, 2002, when he saw the Defendant get a cart, proceed to the electronics department, and place a computer in his cart. The Defendant then picked-up a quart of transmission fluid, which he then paid for at the sporting-goods checkout. The Defendant did not pay for the computer at the register in the electronics department, or the one in the sporting goods department. The Defendant then took the bag with the transmission fluid in it, placed it on top of the computer, and proceeded to the front of the store. The Defendant had the receipt for the transmission fluid purchase, which he waived to the exit greeter, and he walked to his car. The Defendant did not pay for the computer at the cash registers at the front of the store.

Nunley testified that he approached the Defendant and told him he needed to return to the store to discuss the computer. Nunley examined the receipt, which showed the Defendant had not paid for the computer. Nunley asked the Defendant why he took the computer, and he stated it was because "he had a bad drug problem." Another employee called the police, and when they arrived they took the Defendant to jail. The Defendant did not have permission to take the computer, valued at \$798, without paying for it.

On cross-examination, Nunley admitted that he did not take the computer out of the box to inspect it. He did not know if all the parts were in the box. There was no video of this event, although Wal-Mart will make a video if the event was caught on camera. Nunley testified that the Defendant appeared to be intoxicated during the events that day.

Tommy Pleas Arwood, Jr., 2007 WL 1890100, at *2-5.

After trial, Petitioner sought a direct appeal of his convictions. On appeal, this Court noted that:

The Defendant filed his notice of appeal on May 7, 2003, and on October 3, 2003, this Court granted a motion by the Defendant to supplement the record with missing transcripts. The Defendant failed to supplement the record, and on February 17, 2004, this Court ordered the appropriate transcripts to be filed in the Bedford County Circuit Court Clerk's Office. The trial court reporter failed to file the appropriate transcripts, and a show cause order was filed on April 20, 2004. On May 12, 2004, the court reporter was found to be in contempt of court. On May 19, 2004, the first statement of evidence was authenticated by the trial court. From May 2004 until December 2005, a number of motions were filed pro se by the Defendant, which were denied by order of this court on December 29, 2005. Also on that day, the Defendant was ordered to file his brief in this matter.

On February 2, 2006, this Court recognized that the Defendant's counsel had been suspended from the practice of law by a Tennessee Supreme Court order dated January 10, 2006. At that point, new appellate counsel was appointed. On September 22, 2006, this Court ordered the case to be remanded to the trial court for the preparation of a statement of evidence to cover any still missing portions of the transcript. The second statement of evidence was prepared and filed by the trial court on January 23, 2007. Briefs and supplemental briefs were filed, and this case was orally argued on April 17, 2007.

Id. at *1. On appeal, this Court determined that: (1) Appellant was not "denied an effective appeal due to the lack of an official and reliable transcript;" (2) Appellant waived the issues regarding the motion to dismiss and motion to suppress by failing to include them in a motion for new trial; (3) the evidence was sufficient to sustain the convictions; and (4) Appellant was properly sentenced. *Id.* at *14.

Petitioner subsequently filed a motion asking the judge to recuse himself and a pro se petition for post-conviction relief. In the petition, Petitioner argued: (1) his conviction was based on use of evidence obtained pursuant to an unlawful arrest; (2) he was denied effective assistance of counsel; (3) the prosecutor committed misconduct at trial; and (4) various errors committed by the trial court

denied Petitioner a fair trial. The post-conviction court refused to recuse itself but appointed counsel for Petitioner for post-conviction purposes.

The post-conviction court held a hearing on the petition for relief. At the hearing, the post-conviction court learned that Petitioner had been represented by four different attorneys during the trial and appeal process. Petitioner made an oral request at the hearing for the post-conviction court to reconsider its decision to refuse to recuse itself. The post-conviction court again denied the requested relief.

At the post-conviction hearing, substitute appellate counsel¹ testified that when he was appointed to represent Petitioner on appeal, he reviewed the record and noted some deficiencies. Specifically, he noted that the record did not contain transcripts for the motion to suppress, the motion to dismiss, and portions of testimony at trial. The attorney noted those issues in his brief to this Court on appeal. As a result, this Court remanded the case for preparation of a statement of the evidence specifically addressing Petitioner's recollection of the events that were lacking in the transcript.

At that point, appellate counsel provided Petitioner with transcripts from prior proceedings and asked him to review the record. Petitioner was asked to provide appellate counsel with his own version of the events as they transpired. Appellate counsel prepared a version of the testimonies for the statement of the evidence. According to the attorney, Petitioner "participated in the presentation of that statement of evidence." Appellate counsel originally planned to request a hearing on the matter but withdrew his request after he realized that Tennessee Rule of Appellate Procedure 24 did not provide for a hearing.

Appellate counsel acknowledged that the issue regarding the motion to dismiss was not raised in the motion for new trial. Despite this obvious deficiency, appellate counsel chose to raise this issue in the amended appellate brief. The attorney testified that the issue was weak and that any defects in the arrest warrant could have been easily cured by the returning of the indictment by the grand jury. Appellate counsel also tried to get Petitioner a new trial on the basis of the deficiencies in the transcripts but that issue was dismissed by the court.

The assistant public defender that was appointed to represent Petitioner at the General Sessions Court testified at the hearing on the post-conviction petition. According to the assistant public defender, Petitioner was bound over to the grand jury for the charges for which he was ultimately convicted in addition to a charge for driving under the influence ("DUI") that was dismissed by the court. Petitioner agreed to waive his right to a preliminary hearing on the felony offenses based on an agreement with the State to dismiss the DUI charge. This assistant public defender represented Petitioner at the hearing on the motion for new trial but did not participate in any of the pre-trial or trial proceedings. The assistant public defender did not draft the motion for

¹ The first appellate counsel was removed from the case after being suspended from the practice of law for reasons unrelated to this case.

new trial; trial counsel drafted the motion. The assistant public defender merely argued the issues as presented in the motion and did not recall discussing the motion to dismiss or motion to suppress with Petitioner at the hearing. The motion was actually drafted by another assistant public defender who represented Petitioner throughout the proceedings, trial counsel.

Trial counsel testified that he was appointed to represent Petitioner at arraignment. Trial counsel had been practicing law for about fifteen years. Eleven of those years were spent exclusively practicing criminal law. This attorney estimated that he had tried several thousand felony cases and probably several hundred jury trials. The lawyer was even familiar with Petitioner prior to trial.

Trial counsel recalled that the State communicated a written plea offer of eighteen years at sixty percent on July 29, 2002. Trial counsel informed Petitioner of the offer. Trial counsel stated that Petitioner refused the agreement, expressing his desire to receive the same offer that co-defendant Danny Joe Freeman was given. Trial counsel explained that Petitioner's offer included more jail time because of his extensive criminal history. Petitioner was a career offender. The attorney explained to Petitioner that he could receive the maximum sentence on each conviction and that the sentences could be ordered to run consecutively. Trial counsel denied telling Petitioner that the sentences for the WalMart and Johnson Bolt & Screw convictions would run concurrently because they occurred within a twenty-four hour period. The attorney also denied telling Petitioner that the maximum sentence he could receive was eighteen years. Trial counsel did not recall Petitioner expressing an interest in accepting the State's plea offer.

Trial counsel filed the standard discovery motions. He filed a motion to dismiss the arrest warrant and a motion to suppress the evidence that was seized as a result of the arrest. Trial counsel stated that there were no transcripts from these hearings and the trial court denied both motions. Soon thereafter, Petitioner informed trial counsel that he was "fired."

Trial counsel addressed Petitioner's complaint that he did not further investigate State witness Shelly Rogers prior to trial. Trial counsel explained that Ms. Rogers had charges pending against her at the time of trial that were "languishing in General Sessions Court" while Petitioner and a co-defendant were bound over to the Circuit Court. Trial counsel felt that this indicated Ms. Rogers's willingness to serve as a witness against Petitioner. The attorney did file a motion in limine in regard to a tape-recording of a statement by Ms. Rogers. The tape allegedly contained incriminating statements about Petitioner. The State agreed not to use the tape as evidence. Trial counsel acknowledged that he could have used the tape to impeach the testimony of Ms. Rogers but that neither party ended up using the tape at trial.

Trial counsel met with Petitioner several times prior to trial. At the request of Petitioner, his attorney tried to locate a witness named Tina Renee Brannon. The search for Ms. Brannon was unsuccessful. Trial counsel explained that Ms. Brannon would have been utilized as a character witness who would have attacked the credibility of Ms. Rogers.

The State made a second plea offer in December of 2002 for twelve years at forty-five percent. Petitioner accepted this offer. When the offer was presented to the trial court for acceptance, the trial court refused to accept the agreement because it was four days prior to the start of trial and Petitioner “had every opportunity to settle his case” and instead chose to have the case tried before a jury. Trial counsel acknowledged that it was the standard policy of the trial court to reject plea agreements after the time for plea negotiations had passed. At that point, Petitioner could either plead open or go to trial.

During trial, trial counsel did not ask the trial court for an instruction on voluntary intoxication. According to trial counsel, the proof at trial did not warrant the jury instruction because Petitioner had “a detailed recollection of the events” and “it didn’t appear he was so intoxicated that he didn’t know what he was doing.” Trial counsel felt it would have been “disingenuous” to ask for such an instruction.

After trial and sentencing, trial counsel filed motions for new trial in both of Petitioner’s cases. The attorney did not feel that the motion to dismiss needed to be addressed in the motion for new trial because he “felt strongly that the indictment cured any defect within a warrant.” In fact, he felt that “it would have been a totally frivolous ground for appeal.” Trial counsel also felt there was “no legal basis” to raise the motion to suppress as an issue on appeal.

Due to the inadequacy of the trial transcript, trial counsel agreed to a joint statement of the evidence. He admitted that he did not consult Petitioner for his independent recollection of the testimony. Trial counsel informed the court that on appeal, the public defender appointed a contract appellate attorney to represent Petitioner. This attorney never filed a brief and was ultimately suspended from the practice of law for unrelated reasons. Another attorney was appointed to represent Petitioner on appeal.

Petitioner testified at the hearing. He claimed that he only met with trial counsel three times from the time of the arraignment to the time that trial started. In fact, Petitioner claimed that he did not see his lawyer between September 5 and December 12 of 2002. According to Petitioner, he asked trial counsel to find Ms. Brannon and use her at trial as a potential witness to impeach Ms. Rogers’s testimony. Later, Petitioner admitted that he only told trial counsel about Ms. Brannon one day prior to the start of trial. During one of the meetings with trial counsel, Petitioner listened to part of a tape-recording of a statement that Ms. Rogers gave to the authorities.

Petitioner insisted that trial counsel discouraged him from accepting the plea offer of eighteen years because that was “the maximum that you could get.” Petitioner also claimed that trial counsel told him that the sentences “would have to run concurrent because it happened within a 24-hour period.” Petitioner stated that he only rejected the plea offer because trial counsel practically begged him to do so. Petitioner denied rejecting the offer because co-defendant got a better deal. Petitioner even stated that he wrote letters to trial counsel expressing his desire to accept a plea. Petitioner claimed that his letters acknowledged that he wanted to accept the plea offer because he was afraid he was going to get more time if he went to trial.

Petitioner admitted that he asked for and received a mental evaluation that concluded he was mentally competent to stand trial. Petitioner also stated that he asked for a determination of his competency at the time of the commission of the crimes but that he never received one to determine competency at the time of the offenses.

At the hearing on the motion for new trial, Petitioner claimed that his assistant public defender did not raise the issues of the motion to suppress and/or motion to dismiss. Petitioner was adamant about including these issues. Petitioner knew that if he did not include the issues they would be waived on appeal.

Petitioner acknowledged that he communicated back and forth with appellate counsel who eventually lost her law license. His original appellate counsel informed Petitioner that she was waiting on transcripts to be completed and filed with the court. This attorney was replaced at some point and the case was remanded to the trial court for inclusion of the statement of the evidence.

The post-conviction court denied the petition for relief. The post-conviction court described Petitioner as a “very familiar figure in the criminal court of Bedford County” with at least twenty-four prior criminal convictions. The trial court listed nineteen “areas of alleged ineffective assistance of counsel” in its order denying post-conviction relief. The post-conviction court accredited the testimony of trial counsel and appellate counsel² and found Petitioner’s allegations to be without merit, ultimately concluding that Petitioner “has not been deprived of a constitutional right” and “is not entitled to post-conviction relief.”

Analysis *Post-Conviction Standard of Review*

The post-conviction court’s findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court’s findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court’s conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel

²The post-conviction court did not hear testimony from appellate counsel that lost her law license.

were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). “Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

As noted above, this Court will afford the post-conviction court’s factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court’s findings. *See id.* at 578. However, our supreme court has “determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo” with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Failure to Pursue Insanity Defense

Petitioner contends that trial counsel failed to communicate and/or pursue an insanity defense. Petitioner complains that he was only evaluated for his competency to stand trial, not his competency at the time of the commission of the offenses and that trial counsel was ineffective because he failed “to ensure that the court’s order was carried out and a complete mental examination [was] made.” Petitioner did not present any testimony at the post-conviction hearing that would have substantiated an insanity defense. Under these circumstances we conclude Petitioner has failed to carry his burden of showing by clear and convincing evidence that the failure to pursue an insanity defense constituted deficient representation.

Erroneous Advice Regarding Plea Agreement

Next, Petitioner argues that trial counsel improperly informed him that eighteen years, the first plea agreement offered by the State, was the maximum number of years he could receive for his offenses. Trial counsel denied making that statement, instead testifying that he merely informed

Petitioner about the plea agreement and that he could receive the maximum sentence as a career offender.

The post-conviction court accredited the testimony of trial counsel and specifically found that Petitioner was not credible due to the various inconsistencies in his testimony at the hearing. As stated above, “questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact” and the post-conviction court’s credibility determinations are conclusive on appeal unless the evidence preponderates against them. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). The evidence does not preponderate against the post-conviction court’s credibility determination herein. Petitioner has failed to prove by clear and convincing evidence that trial counsel gave erroneous advice with regard to the plea agreement. This issue is without merit.

Failure to Communicate and Investigate

Petitioner also complains that trial counsel failed to communicate effectively with Petitioner prior to trial and failed to investigate potential witnesses prior to trial. Specifically, Petitioner claimed that trial counsel met with him only three times prior to trial and inadequately investigated Ms. Brannon as a potential witness. The testimony at the post-conviction hearing indicated that trial counsel was informed of Ms. Brannon’s existence as a possible impeachment witness the day prior to trial and attempted to locate her to no avail. Further, trial counsel testified that he cross-examined the witness about her credibility by asking her about a worthless check conviction. Additionally, the testimony indicates that trial counsel adequately prepared for trial and met with Petitioner on numerous occasions to discuss strategy and the like. The post-conviction court determined that there was no showing of any harm to Petitioner by the failure of counsel to interview additional witnesses or communicate further trial strategy with Petitioner. The evidence does not preponderate against the judgment of the post-conviction court. Petitioner has failed to carry his burden in this regard. This issue is without merit.

Failure to Pursue Intoxication Defense/Jury Instruction

Petitioner claims that trial counsel “did not explain the possibility of raising intoxication as a defense . . . and did not raise the issue at trial.” Specifically, Petitioner claims that trial counsel’s failure to raise the defense prejudiced Petitioner at trial because the “defense actually raised at trial was weak.” The State contends that there was no proof that the defense was warranted.

We agree with Petitioner that he is entitled to a jury instruction on voluntary intoxication if it is fairly raised by the proof but “[p]roof of intoxication alone is not a defense to a charge of committing a specific intent crime nor does it entitle an accused to jury instructions . . .” *Harrell v. State*, 593 S.W.2d 664, 672 (Tenn. Crim. App. 1979). Trial counsel testified at the post-conviction hearing that an instruction on voluntary intoxication would have been contrary to his trial strategy. We are not at liberty to second-guess trial strategy that is made with appropriate planning

and preparation. *Adkins*, 911 S.W.2d at 347. Further, Petitioner has failed to show that he was prejudiced as a result of trial counsel's decisions. This issue is without merit.

Failure to Include Arguments in Motion for New Trial

Petitioner complains that trial counsel failed to include arguments regarding the denial of the motion to suppress and motion to dismiss in the motion for new trial, effectively waiving those issues on direct appeal.

At the post-conviction hearing, trial counsel testified that he did not include these arguments because he deemed them "frivolous." Trial counsel explained that any defects in the warrant, which were challenged in a motion to dismiss, could have been cured by a return of the indictment. Similarly, trial counsel did not include issues that had been previously determined in the motion to suppress because he felt the issue was without merit. The items seized fit at least three exceptions to a warrantless search.

An attorney is neither duty bound nor required to raise every possible issue on appeal. *Carpenter v. State*, 126 S.W.3d 879, 887 (Tenn. 2004) (citing *King v. State*, 989 S.W.2d 319, 334 (Tenn. 1999)); *Campbell v. State*, 903 S.W.2d 594, 596-97 (Tenn. 1995). Trial counsel, an experienced appellate advocate, focused on the issues that he determined had merit. *See generally Cooper*, 849 S.W.2d at 757 (determining that it is standard practice for advocates to weed out weak arguments in order to focus on just one central issue). An attorney's determination as to the viability of the issues should be given considerable deference. *Carpenter*, 126 S.W.3d at 887; *Campbell*, 903 S.W.3d at 597. They include:

- (1) Were the omitted issues "significant and obvious"?
- (2) Was there arguably contrary authority on the omitted issues?
- (3) Were the omitted issues clearly stronger than those presented?
- (4) Were the omitted issues objected to at trial?
- (5) Were the trial court's rulings subject to deference on appeal?
- (6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
- (7) What was appellate counsel's level of experience and expertise?
- (8) Did the petitioner and appellate counsel meet and go over possible issues?
- (9) Is there evidence that counsel reviewed all the facts?
- (10) Were the omitted issues dealt with in other assignments of error?
- (11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Carpenter, 126 S.W.3d at 888 (citing *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999)).

In the case herein, application of the factors set forth in *Carpenter* indicate that trial counsel's decisions were not deficient. Further, Petitioner has failed to carry his burden of showing that had

this issue been raised he would have received relief on the merits. He has also failed to prove that more probably than not the results of his trial would have been different had challenging the trial court's ruling on the motion to dismiss and motion to suppress been properly preserved and addressed on appeal. Accordingly, no prejudice has been proven. Petitioner is not entitled to relief as to his claim that counsel was ineffective for failing to raise the issues regarding the motion to suppress and motion to dismiss in the motion for new trial.

Ineffective Appellate Counsel

Lastly, Petitioner complains that he was prejudiced by the appellate counsel that failed to prosecute his appeal for several years. Specifically, Petitioner claims that appellate counsel, who was ultimately suspended from the practice of law, committed acts that were presumptively prejudicial and that "actual" prejudice need not be shown. *See Wallace v. State*, 121 S.W.3d 652, 657 (Tenn. 2003).

We acknowledge that appellate counsel's actions were deficient. The delay of Petitioner's appeal for nearly four years was unnecessary and unfortunate. However, appellate counsel was eventually removed from the appointment, and Petitioner's appeal then proceeded without delay. Petitioner argues that the facts in his case are analogous to the facts in *Wallace v. State*, 121 S.W.3d 652 (Tenn. 2003). We disagree. *Wallace* addressed the failure of counsel to file a timely motion for new trial which resulted in the waiver of all issues on appeal save for an argument that the evidence of guilty was insufficient. *Id.* In the case herein, a timely motion for new trial was filed and Petitioner's appeal proceeded in a fairly normal fashion until appellate counsel failed to zealously pursue Petitioner's appeal by failing to file a brief for an extended period of time. Secondly, appellate counsel's deficiencies did not result in a "complete failure to subject the State to the adversarial process" and was, therefore, not presumptively prejudicial. *See id.* In fact, there was no real harm done by the delay. Petitioner was more than adequately represented by his substitute appellate counsel. Petitioner has failed to show by clear and convincing evidence that appellate counsel's representation was prejudicial and is not entitled to relief on this issue.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

